NO. 84-466

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

OCTOBER TERM, 1984

STATE OF OHIO,

Petitioner

v.

MICHAEL BURKHOLDER,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

On July 31, 1981, Respondent, Michael Burkholder, was placed on five years' probation by the Court of Common Pleas of Montgomery County, Ohio, after entering a plea of guilty to breaking and entering. The sentence of not less than two years nor more than five years in the Ohio penal system was suspended.

On September 1, 1982, in the presence of Respondent's probation officer, the Centerville, Ohio police executed a search warrant at Respondent's residence and allegedly recovered approximately one hundred eighty-three items of stolen property. As a result of the seizures made pursuant to the warrant, Respondent was indicted by the Montgomery County Grand Jury on seven counts of receiving stolen property. On November 10, 1982, the trial court sustained a motion to suppress all the evidence obtained in the search because the warrant did not recite facts sufficient to establish probable cause. The cause was subsequently "terminated" by the trial court entering a nolle prosequi, and has not been appealed.

On December 22, 1982, a notice of revocation of Respondent's probation was filed and a revocation hearing was held on or about December 28, 1982, at which the alleged stolen property recovered from the search of Respondent's residence was introduced to show that he had violated the terms of his probation. The same trial court which suppressed the evidence at trial, admitted it at the probation revocation hearing. The trial court held that the exclusionary rule did not apply to a convicted felon in probation revocation proceedings, and reinstated the original sentence of imprisonment.

Upon appeal, the court of appeals reversed the judgment of the trial court and remanded the cause for further proceedings. The appellate court

opined that so long as the exclusionary rule exists, it must be applied uniformly to all criminal trials and hearings. The court of appeals cited State v. Gallagher (1974), 38 Ohio St. 2d 291 [67 O. O. 2d 354], on remand (1976), 46 Ohio St. 2d 225 [75 O.O. 2d 280], for the proposition that utterances made by an accused to his parole officer are inadmissible at trial where such utterances were made in response to questioning by the parole officer without the accused being advised of his Miranda rights. Despite its distinctions from the instant case, the court of appeals observed that Gallagher provides the key to the question of the extent of constitutional privileges.

The court of appeals, finding its judgment to be in conflict with another court of appeals in Ohio, certified the record of the case to the Ohio Supreme Court.

On July 25, 1984, the Ohio Supreme Court issued its written decision wherein the court held that, pursuant to Section 14, Article I of the Ohio Constitution, evidence obtained through an unreasonable or unlawful search and seizure is inadmissible in a probation revocation proceeding. The court held that its decision was consistent with State v. Gallagher, supra, in that a probationer, like the parolee in Gallagher, must be afforded the right to assert his or her constitutional privileges.

ARGUMENT

This court has said:

> "If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision." Michigan v. Long, ____ U.S. ____, 103 St. Ct. 3469 at page 3476 (1983).

This proposition, that a state court's determination of an issue, that otherwise contains federal constitutional implications upon adequate state grounds precludes review by this Court, is present in the case sub judice.

The Syllabus of the Ohio Supreme Court's opinion below, which in Ohio carries the authority of law (Ohio Supreme Court Rules for the Reporting of Opinions, Rule 1(B); see also Beck v. Ohio, 379 U.S. 89, at page 91, 85 S. Ct. 223, at page 226 (1964)), states specifically:

> "Pursuant to Section 14, Article I of the Ohio Constitution, evidence obtained through an unreasonable search and seizure is inadmissible in a probation revocation proceeding." (Emphasis added).

In addition, the courts below cited state authority, specifically State v. Gallagher, 46 Ohio St. 2d 225, 348 N.E. 2d 336 (1976), as a basis for their holding. In that case, the Ohio Supreme Court held that the suppression rule under the Miranda doctrine applied to a convicted felon on parole. The courts below cited Gallagher as authority for the law that neither a parolee nor a person on probation is denied the right to assert a constitutional privilege.

It should be noted that the Gallagher case was remanded by this Court to the Ohio Supreme Court for clarification of whether the state court's decision was based upon state or federal law. 425 U.S. 257, 96 S. Ct. 1438 (1976). Gallagher pre-dated Michigan v. Long, (1983) supra, wherein this Court specifically rejected the practice of vacating and continuing a case for clarification in favor of the requirement that a state court make a "plain statement" that a decision rests upon adequate and independent state grounds.

In the case at bar, the state courts have satisfied the "plain statement" requirement. The specific references to the state constitution in the Syllabus, as well as references to the other state court decisions, indicate that the decision below rested on grounds adequate and independent from the state court's interpretation of federal law.

Furthermore, the Ohio Supreme Court in Gallagher expressly rejected decisions of other states based upon the unique position of power held by parole officers under Ohio law, a position similarly held by probation officers (see Ohio Revised Code, §2951.08). Given the lack of uniformity among the states concerning the status and powers of probation officers, the present status of this area of law represents the most flexible and least restrictive approach for the states.

This Court has also often stated the proposition that "a State is free as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards." Oregon v. Hass, 420 U.S. 714, at page 719, 95 S. Ct. 1215, at page 1219 (1975). Assuming arguendo that the state court's decision below does not rest on adequate state grounds, review by this court would amount to an advisory opinion in the face of Oregon v. Hass.

The authority is split as to the question presented by the Petition, herein. However, until this Court specifically refrains from either imposing greater restrictions on police activity or extending the constitutional protections afforded by the Ohio Supreme Court, the states remain free to do so, especially based upon their interpretation of state law.

Thus, because the decision of the Ohio Supreme Court rests upon adequate state grounds, the Petition for Writ of Certiorari should be denied.

CONCLUSION

WHEREFORE, the decision of the Ohio Supreme Court rests on adequate and independent state grounds, thereby precluding this Honorable Court's review, the State of Ohio's Petition for a Writ of Certiorari should be DENIED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion, Affidavit, and Brief in Opposition were delivered to the Office of Lee C. Falke, Prosecuting Attorney for Montgomery County, Ohio, to Ted E. Millspaugh and Sharon L. Ovington, Assistant Prosecuting Attorneys, Appellate Division, Montgomery County Administration Building, 7th Floor, 451 West Third Street, Dayton, Ohio, Counsel for Petitioner, herein, this ____ day of November, 1984.

BY David P. Williamson
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